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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

In re CODY Y., a Person Coming Under the Juvenile Court Law. ---------- ERIC B., Plaintiff and Respondent, v. THOMAS Y., Defendant and Appellant.	C038280 (Super. Ct. No. 01FL013)

Thomas Y., the biological father of the minor, Cody, appeals from a judgment freeing the minor from his custody and control pursuant to Family Code sections 7822 and 7825 (further undesignated section references are to this code). Appellant contends there was insufficient evidence he abandoned the minor or that his felony convictions rendered him an unfit parent. We affirm.

FACTS

In January 2001, Angela B., the minor's mother, and Eric B., his stepfather, filed a petition to declare the minor, born in October 1994, free from appellant's custody so that the minor could be adopted by Eric B. The petition alleged that appellant had not seen the minor since January 1998, had made only sporadic, token attempts to see him, and had not provided support for the minor since August 1997. The petition further alleged appellant had been convicted in 1998 of manufacturing and possession of methamphetamine with findings of prior drug-related convictions and was unfit to have custody of the minor.

In a declaration accompanying the petition, Angela B. stated that appellant was the minor's biological father but that she had been married to Eric B. since July 1995 and Eric B.'s name was on the minor's birth certificate. The declaration further stated appellant had paid some child support up to August 1997 but had not paid any support thereafter despite having the ability to do so from gambling winnings of $10,000. The declaration also stated that appellant, who had a history of involvement with drugs, was currently in state prison and had spent much of the last 12 years incarcerated.

The court investigator's report, filed in March 2001, detailed appellant's history of criminal offenses and parole violations and noted that appellant maintained a clean and sober lifestyle only while supervised. The investigator

interviewed appellant, who blamed his lack of contact with the minor while in custody on Angela B. because she would not accept his collect telephone calls. The investigator also spoke to the minor who did not fully understand that appellant was his biological father, although he did recall one visit with him.

At the contested hearing, the undisputed facts were: Appellant and Angela B. had conceived the minor during a brief interlude in Reno, Nevada. When the minor was born in 1994, appellant was in custody. Appellant provided no financial support during Angela B.'s pregnancy.

After release from his California Rehabilitation Center (CRC) parole, appellant contacted Angela B. and arranged his first visit with the minor in the late summer of 1996. Appellant then decided to initiate legal proceedings to formalize visitation and modify an existing child support order. As a result of mediation, appellant began regular visits with the minor in December 1996. Visits were supervised at first but by mid-1997 appellant had regular overnight visits with the minor. Appellant's last visit occurred in January 1998. At that time, Angela B. became concerned appellant had relapsed into drug use and filed a motion to restrict his visitation. Appellant appeared in court in February 1998 on the visitation issue but refused to submit to a drug test. Appellant did not appear at a subsequent hearing in March 1998 when the court adopted

orders requiring him to provide a clean drug test before visiting the minor.

During 1997, appellant's paycheck was attached to pay ongoing child support and to defray arrears. After January 1998, appellant was no longer working, but did win $10,000 gambling. Between August 1997 and March 1998, Angela B. contacted appellant about support payments which she had not received. Appellant used his winnings to buy a motorcycle and Angela B. received no further support.

In April 1998, appellant was arrested on drug charges and by September was sentenced and transported to state prison where he remains. In July 1998, while in local custody, appellant placed a conference call to Angela B. through his girlfriend and asked to speak to the minor. On learning appellant would be serving a lengthy sentence, Angela B. refused to let him speak to the four-year-old minor because she feared it would be too traumatic. Appellant did not request visitation while in local custody.

In March 2000, appellant again called Angela B., who again would not let him speak to the minor. During that call, appellant asked Angela B. to provide him an address so that he could write to the minor but had no way to write it down. Accordingly, appellant contacted his niece who called Angela B. in July 2000 and got the address. Thereafter, appellant sent a few cards and letters to the minor; however, Angela B. did not give them to the minor. In October 2000, Angela B. accepted another telephone call from appellant but would not

let him speak to the minor. Appellant had maintained ongoing contact with his own family while in local custody and state prison.

Evidence about appellant's ongoing efforts to maintain contact with the minor after January 1998 and to provide support for him was in sharp conflict. Appellant testified he tried calling Angela B. many times while in local custody and in state prison, but she would not accept the collect calls. Appellant also testified he had sought help from several sources in an attempt to get visitation or contact with the minor. Appellant believed he was current on his support obligations and that his employer was attaching his wages until the end of 1997. Appellant also stated he used his gambling winnings to buy the motorcycle instead of paying child support, in part, because he was arguing with Angela B.

Angela B. and Eric B. testified they had received no telephone calls from appellant other than the one in 1998 and the two in 2000, that his relatives had not contacted them for visits with the minor or to get an address for appellant until July 2000, and they received no support payments after August 1997. Angela B. did acknowledge she had refused one collect call in the summer of 2000 but testified she had not refused any others.

At the conclusion of the hearing, the court freed the minor from appellant's custody and control. The court found there were two periods of abandonment and failure to support. The first period was during the first two years of the minor's

life. The second was from February 1998 until appellant asked his niece to get the minor's address in July 2000. The court found appellant made no real effort to contact the minor during the latter period. The court found appellant had made no effort to visit from February 1998 to his arrest, did not request a visit during the time when he was in local custody and did nothing to reinstate contact for the rest of the period. The court observed that "all it takes is a letter to a relative" to get the necessary information, i.e., telephone number or address, to maintain contact and appellant did not take that step. The court further found appellant made no voluntary support payments despite an ability to do so with his $10,000 winnings. The court also found that appellant was unfit to be a parent, pursuant to section 7825, based upon appellant's felony drug conviction coupled with his history of criminality, the seriousness of the offense of manufacturing methamphetamine, and the lack of lasting rehabilitation.

DISCUSSION

I

Appellant contends the evidence was insufficient to support abandonment.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- to support the conclusion of the trier

of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Nanette M.* (1990) 219 Cal.App.3d 202, 207; *In re B. J. B.* (1986) 185 Cal.App.3d 1201, 1211.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Gano* (1958) 160 Cal.App.2d 700, 705; *In re Barton* (1959) 168 Cal.App.2d 584, 589-590.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Section 7822, subdivision (a), which authorizes a proceeding to free a minor from parental custody, provides, in pertinent part: "A proceeding under this part may be brought where the child has been left . . . by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent . . . with the intent on the part of the parent or parents to abandon the child." Subdivision (b) of that section states: "The failure . . . to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent . . . [has] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent . . . ."

The intent to abandon need only exist for the statutory period of one year. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 883-885.) In determining intent to abandon, the trial

court considers all the circumstances. (*In re B. J. B.*, *supra*, 185 Cal.App.3d at p. 1212.) Thus, while either a failure to communicate or a failure to support alone coupled with the requisite intent can establish abandonment, the court may consider the existence of both factors in making its determination. (*In re Conrich* (1963) 221 Cal.App.2d 662, 667.)

Here, the uncontradicted evidence established there were two periods, each of which exceeded the statutory interval of one year, during which appellant neither communicated with, nor provided support for the minor. As to the second period from January 1998 to the summer of 2000, there was conflicting evidence on the question of whether appellant made only token efforts to communicate or whether he conscientiously and persistently used the sole means available to him to communicate with the minor only to have his efforts blocked by Angela B. and Eric B. The court took into account all the evidence, assessed the credibility of the parties and resolved the conflict adversely to appellant. Accordingly, the evidence showed appellant made no effort to support the minor after January 1998 and made only token efforts to communicate with the minor until he asked his niece to secure the minor's address. As the court pointed out, this could have been done at any time since appellant was always in contact with his family.

Incarceration, by itself, is not a defense to abandonment. (*In re Rose G.* (1976) 57 Cal.App.3d 406, 424.)

It is perfectly possible for an incarcerated parent to maintain communication, even with very small children, by mailing letters and cards on a regular basis, thereby defeating a presumption of intent to abandon. (*In re T. M. R.* (1974) 41 Cal.App.3d 694, 698-699.) Appellant did not attempt to maintain such communication after his arrest and sentencing in 1998. His intent to abandon the minor was clear.

Appellant contends the court improperly relied upon the period from the minor's birth until 1996 in finding abandonment since that period was not alleged in the petition. Because the evidence of abandonment from the period of January 1998 until July of 2000 is sufficient to affirm the court's orders, we need not address whether the court could have relied upon the earlier period in terminating appellant's parental rights. We note only that, even if the court could not, consonant with principles of due process, rely upon the earlier period to find abandonment (*In re Jay R.* (1983) 150 Cal.App.3d 251, 259-260), the court could consider the evidence of appellant's behavior during the earlier period in assessing his later intent to abandon the minor. The minor's interest is in a stable and secure home. A pattern of repeated absences by a parent during the minor's development is inimical to that interest. (*In re Daniel M.*, *supra*, 16 Cal.App.4th at pp. 884-885.)

II

Appellant contends the court erred in concluding his drug-related felony conviction constituted a proper basis for

terminating his parental rights pursuant to section 7825. As we have found substantial evidence supported the trial court's finding of abandonment, we need not address this contention.

DISPOSITION

The judgment is affirmed.

CALLAHAN, J.

We concur:

DAVIS, Acting P.J.

RAYE, J.